Nos. 19-1614(L) & 20-1215

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MAYOR AND CITY COUNCIL OF BALTIMORE,

Plaintiff-Appellee,

v.

ALEX M. AZAR II, in his official capacity as the Secretary of Health and Human Services, et al.,

Defendants-Appellants,

On Appeal from the United States District Court for the District of Maryland, Case No. 1:19-cv-01103, Hon. Richard D. Bennett

BRIEF OF *AMICUS CURIAE* NATIONAL FAMILY PLANNING & REPRODUCITVE HEALTH ASSOCIATION SUPPORTING APPELLEE

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CORPORATE DISCLOSURE STATEMENT

The *amicus curiae* National Family Planning & Reproductive Health Association is a nongovernmental corporate party. It has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

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INTERESTS OF THE AMICUS CURIAE AND INTRODUCTION

The National Family Planning & Reproductive Health Association ("NFPRHA") is a national, nonprofit membership organization established almost 50 years ago to ensure access to voluntary, comprehensive, and culturally sensitive family planning and sexual health care services for all.[1] NFPRHA is the lead national advocacy organization for the Title X family planning program and works to maintain Title X as a critical part of the public health safety net for those with limited economic resources. In addition to its advocacy, NFPRHA provides education and technical assistance to Title X grantees and grant sub-recipients, supporting the work of those entities as they implement Title X.

NFPRHA represents more than 950 health care organizations in all 50 states, the District of Columbia, and the U.S. territories. NFPRHA's members include state, county, and local health departments; private non-profit family planning organizations (including Planned Parenthood affiliates and many others); family planning councils; hospital-based health practices; and federally qualified health centers ("FQHCs").

[1] No counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person specified in Fed. R. App. P. 29(a)(4)(E)(iii) made a monetary contribution intended to fund the preparation or submission of this brief. NFPRHA has filed an accompanying motion to appear as *amicus curiae*.

Immediately before implementation of the 2019 Title X regulations (the "2019 Rule") at issue here, NFPRHA's members included 70 Title X services grantees—nearly 80% of all grantees—and hundreds of grant subrecipients participating in Title X projects spanning every state, the District of Columbia, and two territories. Those NFPRHA members funded or operated more than 3600 health centers (92% of all Title X service sites) to provide Title X family planning to approximately 3.7 million patients each year.

The 2019 Rule imposed an ethical Hobson's choice on providers and made ongoing service to patients extremely difficult, triggering massive provider departures across the Title X network. As a result, NFPRHA's members now fund or operate almost 1000 fewer Title X service sites in just 40 states, which translates into approximately 1.5 million fewer Title X patients served by NFPRHA-member providers each year. But if the 2019 Rule is vacated and the program's prior, long-standing regulations focused on high-quality family planning care are restored, the many NFPRHA members that withdrew from the Title X program due to the 2019 Rule will seek to return.

NFPRHA participates as *amicus curiae* in this appeal because the remedy below did not match the district court's substantive ruling and erroneously left the Title X network with new irrationalities. The court's judgment under the Administrative Procedure Act ("APA") failed to correctly implement the APA's

statutory remedy of vacatur; failed to fully redress Plaintiff's injury from improper agency rulemaking; and created an unworkable geographic hole in a national competitive grant program that further undermines Title X's functioning. The APA specifies that arbitrary or contrary-to-law rulemaking is vacated in order to annul such misuse of authority. Vacatur redresses rulemaking failures at the agency—where those occurred—and has never before been limited by a plaintiff's geography. NFPRHA urges the Court (i) to affirm judgment for Plaintiff; (ii) to correct the district court's unprecedented attempt at state-based "vacatur" of federal rulemaking; and (iii) to order true vacatur of the unlawfully adopted and harmful 2019 Rule.

IMPORTANT TITLE X CONTEXT FOR THIS APPEAL

A. The Nationwide Purpose and Structure of the Title X Program

The Title X program came about to help the "medically indigent:" those who could not afford modern, clinical family planning care like the new oral contraceptive pill and did not "happen to live in an area where" public or voluntary agencies offered access. S. Rep. No. 91-1004 at 9-12 (1970). After research showed that unequal access to care made many low-income women less able to match their actual childbearing with their desired family size, President Nixon called on Congress to "establish as a national goal the provision of adequate family planning services . . . to all who want them but cannot afford them." Richard M.

Nixon, Special Message to the Congress on Problems of Population Growth (July 18, 1969). With overwhelming bipartisan support, Congress responded in 1970 by enacting Title X.

Congress created this national program to "mak[e] comprehensive voluntary family planning services readily available to all persons desiring such services;" to coordinate further research; to improve the effectiveness of family planning efforts; and "to assist in providing trained manpower" for Title X projects. Pub. L. No. 91-572 § 2 (statement of purpose), 84 Stat. 1504 (1970). As Plaintiff has briefed, over the intervening decades Congress passed additional substantive requirements for the Department of Health and Human Services' ("HHS") implementation of this unique federal public health program.

Title X family planning services are funded through competitive grant-making under its Section 1001. 42 U.S.C. § 300. Under Section 1003, 42 U.S.C. § 300a-1, Title X also funds the Family Planning National Training Center and the National Clinical Training Center, which conduct training for the clinical and other personnel involved in this specialized area of health care.[2] For each of the last

[2] *See* About Us, Family Planning National Training Center ("FPNTC"), https://www.fpntc.org/about (FPNTC "works in collaboration with [HHS's Office of Population Affairs ("OPA")] to address the needs of Title X family planning service grantees and providers" and "to ensure that personnel working in family planning have the knowledge, skills and attitudes necessary"); Home, National Clinical Training Center for Family Planning, http://www.ctcfp.org/ (center

several years, Congress has appropriated $286,479,000 annually for Title X purposes. Of that, HHS distributes approximately $260 million annually in Section 1001 grants for Title X services "projects."

HHS awards project grants through competitions that start with a funding opportunity announcement ("FOA"): a lengthy document that describes the criteria that will be used to evaluate applications against one another, discusses HHS's current program priorities, and sets forth Title X-specific and general federal funding requirements, all to outline what Title X applications must address. *See, e.g.*, HHS, Initial Competitive Grant Announcement of Availability of Funds for Title X Family Planning Services Grants, https://www.hhs.gov/opa/sites/default/files/FY2019-FOA-FP-services.pdf.

In response to the FOA, Title X competitive grant applications run 150 pages and include a 65-page project narrative, a work plan, detailed budget documents, and a coverage map of the areas the applicant proposes to serve—which need not be contiguous with any state or city. *See, e.g.*, *id.* at 5 (applicants may propose to serve any combination of service areas or subset of a single service area listed), 7-39 (application requirements).

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delivers "clinical skills training and resources to health care providers within the Title X and related public health communities").

For the last two competitive grant-making cycles (in Fiscal Years 2018 and 2019), HHS conducted nationwide competitions open to applicants from any U.S. jurisdiction. In a competition, HHS must conduct an objective review process, involving knowledgeable outside reviewers, to score and rank each application on the FOA's stated criteria before HHS makes the ultimate decision on awarding grants. 45 C.F.R. § 75.204 & App. I to Part 75; HHS Grants Policy Statement at I-29-30, https://www.hhs.gov/sites/default/files/grants/grants/policies-regulations/hhsgps107.pdf; *see also* 42 C.F.R. § 59.7(b)-(c) (the 2019 Rule's added application eligibility requirement and new competitive review criteria).

As the 2019 Rule acknowledges, a Title X "project" means the "sequence of activities that is funded to fulfill the requirements elaborated in a Title X funding announcement." 42 C.F.R. § 59.2. Title X projects consist of the administrative, oversight, educational, and clinical activities necessary to provide accessible family planning services. For patients with incomes below the federal poverty level, those services are provided free of charge; other patients pay on a sliding fee scale. Services occur in ordinary health care centers and other facilities not limited to Title X activities, such as local health departments and school-based clinics. Within each Title X project, there are typically three levels of activity, involving: (1) the grantee (a nonprofit or state or local governmental entity), (2) grant sub-

recipients (also nonprofits or governmental entities), and (3) individual sites offering Title X services that are operated by either the grantee or a sub-recipient.

Until implementation of the 2019 Rule, this specialized Title X system built up over decades succeeded in providing uniform, national high-quality family planning care for all.[3] While Title X's annual funding comes to HHS in one lump sum, and nothing in the Title X statute explicitly requires HHS to fund services projects in every region or state, HHS has until now taken seriously its responsibility to "all who want family planning services but cannot afford them." *See supra* at 3. Until 2019, HHS had blanketed the country with Title X projects, funding one or more in each state and spreading service sites to 64% of U.S. counties. *See* Kinsey Hasstedt, Guttmacher Institute, https://www.guttmacher.org/article/2019/03/what-trump-administrations-final-regulatory-changes-mean-title-x. Moreover, until the 2019 Rule, HHS had required Title X projects to comply with the federal government's own national

[3] *See* Kinsey Hasstedt, Guttmacher Institute, https://www.guttmacher.org/gpr/2017/01/why-we-cannot-afford-undercut-title-x-national-family-planning-program# (describing Title X's success, national standards, and high-quality providers); Institute of Medicine, *A Review of the HHS Family Planning Program* at 112 (2009) (grantees have demonstrated "success in developing networks of care and serving patients in their communities, the interest and skill necessary to carry out the subcontracting required, and the ability to meet [OPA] standards in collecting data and monitoring the performance of [sub-recipients]. Continuity with high-performing grantees ensures continuity in service delivery through a well-established and -functioning network").

clinical standards for family planning care, referred to as "the QFP." *See* CDC/OPA, *Providing Quality Family Planning Services*, available at https://www.cdc.gov/reproductivehealth/contraception/qfp.htm.

B. The Current Patchwork of Reduced Title X Access

The 2019 Rule, *inter alia*, required substandard care, contrary to the QFP and ethical principles, for Title X patients receiving pregnancy testing and counseling; it also demanded untenable and counterproductive "physical separation" for the personnel, medical records systems, and locations involved in Title X activities. 42 C.F.R. §§ 59.2, 59.5, 59.7, 59.13-.16, 59.18. As a result, the 2019 Rule caused many grantees and sub-recipients, including a number that had served Title X patients since the program's inception, to leave. By September 2019, there were at least five states without any Title X providers, more than 900 service sites withdrawn from the program, at least 18 fewer grantees, and more than 200 fewer subrecipients. *Compare* HHS September 2019 and June 2019 Title X Directories, available at https://www.hhs.gov/opa/title-x-family-planning/title-x-grantees/archive/index.html.[4]

[4] A sixth state, Hawaii, has also stopped taking federal funds and currently operates no Title X sites, yet HHS still lists it in the Title X directories. *See* March 2020 Title X Directory at 117, https://www.hhs.gov/opa/sites/default/files/Title-X-Family-Planning-Directory-March2020.pdf. Within Maryland, the 2019 Rule caused all Title X providers to leave the program but one: Community Clinic Inc. ("CCI") in Silver Spring remains as a grantee and operates seven sites in one small but densely populated area of the state. *Id.* at 9.

When that exodus occurred, it meant that HHS had additional, now-unused Title X funds to distribute. Rather than run a competition to attempt to find new, additional grantees to help fill the Title X program's geographic holes, however, HHS allowed only the remaining Title X grantees to compete in September 2019 for the excess funds—meaning that the program's large holes, including whole states, went unfilled. *See* Brittni Frederiksen et al., Kaiser Family Foundation, Data Note, https://www.kff.org/womens-health-policy/issue-brief/data-note-is-the-supplemental-title-x-funding-awarded-by-hhs-filling-in-the-gaps-in-the-program/. Similarly, for Fiscal Year 2020 funding, HHS has provided only continuation funding (i.e., without the need to compete) to the remaining patchwork of grantees, but has so far not run a competition to attempt to address the program's huge unserved areas and award the full Title X appropriation.[5] In essence, HHS has doubled down only where pre-existing providers attempt to cope with the 2019 Rule. It has allowed the many communities where providers have left the program

[5] Title X grants are typically awarded for multi-year grant periods. If successful in the competitive grant process for such awards, grantees can then receive "continuation funding" through a streamlined process for the second and third years, for example, of three-year grant awards. On December 31, 2019, HHS released a non-binding "forecast" of a competitive FOA for "areas of high need" that it estimated would be posted by January 15, 2020, with applications due by April 15, 2020. HHS, https://www.grants.gov/web/grants/search-grants.html?keywords=%22family%20planning%22 (opportunity number PA-FPH-20-001). That FOA has never been released.

to lose Title X access for a considerable length of time—already approaching one year.

This context means that, despite the district court's ruling for the City of Baltimore in this case, the City currently has no opportunity to resume providing Title X services. Likewise, the State of Maryland has no current opportunity to do so, nor do any of its former sub-recipients.

Moreover, even if HHS does soon run a national competition for additional Title X grantees, that competition would be governed by the 2019 Rule, its requirements, and its grant-making criteria.[6] HHS has shown that it is willing to tolerate large areas without any Title X providers and to favor those that have continued to operate under the 2019 Rule's regime. *See supra* at 8-9. HHS would have no obligation to try to include Maryland providers—where it is now enjoined from applying the 2019 Rule—in any new grants of Fiscal Year 2020 funds. Nor could HHS workably or fairly run a competition for this single federal funding

[6] That is, unless this Court or one of the others with pending challenges to the 2019 Rule properly and truly vacates it. HHS erroneously asserts in this appeal that NFPRHA and other plaintiffs (including the State of Maryland) litigating cases brought in Washington, Oregon, and California have "lost." HHS Suppl. Br., Dkt. No. 108, at 48. A pending petition for rehearing of the three preliminary injunction appeals remains before the Ninth Circuit, *see* Case No. 19-35394, Dkt. No. 139, and in all of the Ninth Circuit actions there are additional claims still pending in the district courts that were never included in the preliminary injunction appeals.

stream using two different sets of criteria, program requirements, and other regulatory parameters. *See supra* at 5-6.

C. The District Court's Incomplete Statutory Remedy

In its summary judgment opinion, the district court correctly held that HHS acted arbitrarily in promulgating the 2019 Rule and referenced the need to "set aside" that rule under Section 706 of the APA. *Mayor & City Council of Baltimore v. Azar*, No. 1:19-cv-01103 (D. Md. Feb. 14, 2020), Dkt. No. 94 at 25 ("In this case . . . the Court is compelled to set aside the Final Rule as arbitrary and capricious."). When that vacatur remedy did not appear in the Court's final judgment, however, Plaintiff moved to clarify the judgment.

The district court subsequently ordered the 2019 Rule "vacated and set aside in the State of Maryland." Dkt. No. 99 at 2-3. Plaintiff then called the Court's attention to vacatur's operation on the improper rulemaking, and not on particular geographic areas or parties. Dkt. No. 103 at 5 ("When a rule is vacated it ceases to be effective," is annulled, and lacks legal significance "for all purposes.").

Plaintiff made clear that while a preliminary injunction, for example, could be limited in scope, "it was erroneous for the Court to limit its ultimate vacatur of the Final Rule to the State of Maryland." *Id.* Ever since the initial filing of its Complaint, Plaintiff had requested that the court "Set aside and vacate the Final Rule," specifically denoting that as a separate form of requested relief. Dkt. No. 1

("Compl.") at 67 (Prayer for Relief (b)). Nonetheless, the district court declined to correct its unprecedented state-based limitation on the APA vacatur remedy, confusingly continuing to mix discussion of injunctions with discussion of vacatur. *See* Dkt. No. 115. The court's final judgment included both a permanent injunction of the 2019 Rule in the State of Maryland and this "vacatur" in the State of Maryland.

ARGUMENT

I. THE APA'S STATUTORY REMEDY OF VACATUR ANNULS AN UNLAWFULLY PROMULGATED RULE AT ITS SOURCE

A. The APA Unambiguously Provides That a Rule Resulting from an Agency's Unlawful Use of Its Powers Must Be Set Aside

The APA empowers affected parties to challenge agency rules that result from an arbitrary and capricious rulemaking process and/or are contrary to the law that limits the agency's regulatory authority. Once a plaintiff has proven such fundamental misuse of an agency's administrative power, the text of the APA dictates the statutory remedy for that injury. The APA directs that "[t]he reviewing court *shall*—hold unlawful and *set aside* . . . ." the unlawful agency action. 5 U.S.C. § 706(2) (emphasis added). To "set aside" means "to annul or vacate." "Set Aside," Black's Law Dictionary (11th ed. 2019); *see O.A. v. Trump*, 404 F. Supp. 3d 109, 152 (D.D.C. 2019) ("[U]nder the plain language of the APA, the Court must 'annul or vacate' the agency's action.").

The remedy of vacatur has a specific effect, as courts have long made clear. "To 'vacate,' as the parties should well know, means 'to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside.'" *Action on Smoking & Health v. C.A.B.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (quoting 91 C.J.S. *Vacate* (1955)); *see Stewart v. Oneal*, 237 F. 897, 906 (6th Cir. 1916) ("Now 'vacate' and 'suspend' are not synonymous. Vacate means to annul, set aside, or render void; suspend, to stay. When a thing is vacated it is devitalized. It is not when suspended. It may be suspended, and yet retain its vitality."); *see also City & Cty. of San Francisco v. Azar*, 411 F. Supp. 3d 1001, 1025 (N.D. Cal. 2019) ("The rule is not being enjoined or severed. It is being vacated in its entirety based on the administrative record.").

Because the APA's statutory remedy directs that a rulemaking that violates the APA must be "set aside"—that is, vacated—once a court's final judgment has invalidated a rule, the rule is a legal nullity. Unless and until the agency acts again, within its proper powers, to cure the defects in the rule, it lacks the force of law. That is because "[c]ertainly regulations subject to the APA cannot be afforded the 'force and effect of law' if not promulgated pursuant to the statutory procedural minimum found in that Act." *Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979); *see, e.g.*, *United States v. Goodner Bros. Aircraft, Inc.*, 966 F.2d 380, 384 (8th Cir.

1992) ("A regulation not promulgated pursuant to the proper . . . procedures has no 'force or effect of law' and therefore is void ab initio."); *W.C. v. Bowen*, 807 F.2d 1502, 1505 (9th Cir.), *opinion amended on denial of reh'g*, 819 F.2d 237 (9th Cir. 1987) ("An agency rule which violates the APA is void. Agency action taken under a void rule has no legal effect." (internal citation omitted)).

B. The District Court's Geographic Limitation on Vacatur Is Unprecedented and Illogical

The district court cited no precedent for a "vacatur" limited to one geographic area and failed to address the logical fallacies in that novel approach. Likewise, this *amicus curiae* has not located any case, other than the decision on appeal, where a court ordered vacatur of a rulemaking limited to a party or by geography. The Government has sought such a-textual limited "vacaturs" in a handful of recent cases, but each time it has soundly been rebuffed.[7] Given the unambiguous directive of the APA, and that the Government is illogically arguing it can continue to enforce a nullity, that is not surprising. The law under the APA is clear: "When a reviewing court determines that agency regulations are unlawful,

[7] *See, e.g.*, *District of Columbia v. U.S. Dep't of Agric.*, No. 20-cv-119, 2020 WL 1236657, at *34 (D.D.C. Mar. 13, 2020); *New York v. United States Dep't of Health & Human Servs.*, 414 F. Supp. 3d 475, 575-76 (S.D.N.Y. 2019); *O.A.*, 404 F. Supp. 3d at 152-53; *City & Cty. of San Francisco*, 411 F. Supp. 3d at 1025; *New Mexico Health Connections v. U.S. Dep't of Health & Human Servs.*, 340 F. Supp. 3d 1112, 1183 (D.N.M. 2018); *Desert Survivors v. U.S. Dep't of the Interior*, 336 F. Supp. 3d 1131, 1134 (N.D. Cal. 2018).

the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989).

It requires impossible "logical gymnastics" to decide that a rule that has been vacated, and thus become a legal nullity, is nonetheless enforceable. *O.A.*, 404 F. Supp. 3d at 153. The courts faced with the Government's new effort to erode the APA's statutory remedy have repeatedly expressed this inability to both "set aside" and continue a federal rule in force. "[W]hat would it mean to vacate a regulation, but only as applied to the parties before the Court. . . . What would it mean to 'vacate' a rule as to some but not other members of the public? What would appear in the Code of Federal Regulations?" *Id.*; *see New Mexico Health Connections*, 340 F. Supp. 3d at 1183 ("[T]he Court cannot, in an intellectually honest manner, limit vacatur of the rules to the state of New Mexico. The Court does not know how a court vacates a rule only as to one state, one district, or one party.").

The logic of the APA itself confirms this understanding, because the APA vindicates the public's right to be regulated only by administrative rules promulgated in a lawful, procedurally proper way. Under the APA, the remedy is vacatur because the "plaintiff's claim is that the agency has breached the plaintiff's (and the public's) entitlement to non-arbitrary decision making . . . when the

agency undertook to promulgate the rule. Consequently, to provide the relief that any APA plaintiff is entitled to receive . . . the rule must be invalidated, so as to give interested parties (the plaintiff, the agency, and the public) a meaningful opportunity to try again" and accomplish lawful regulation. *Make the Rd. New York v. McAleenan*, 405 F. Supp. 3d 1, 72 (D.D.C. 2019); *see Camp v. Pitts*, 411 U.S. 138, 143 (1973) ("If that finding is not sustainable on the administrative record made, then the Comptroller's decision must be vacated and the matter remanded to him for further consideration."). This necessarily means that where the challenged agency action "consist[s] of a rule of broad applicability . . . if the plaintiff prevails, the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual." *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998).

It is inherent in the nature of the APA injury, and thus remedy, that the relief provided to a single injured plaintiff may "affect[] the rights of parties not before the court." *Id.* "A rule cannot be vacated in its entirety on the ground that it is 'not in accordance with law' for a limited group of parties only. It can only be vacated as to all applicable parties." *City & Cty. of San Francisco*, 411 F. Supp. 3d at 1025; *see New Mexico Health Connections*, 340 F. Supp. 3d at 1183 ("The rules do not apply only to New Mexico; they apply nationwide and, thus, have nationwide harms. Further, the deficiencies with the rules are not specific to New Mexico but,

again, rather inherent in the rules themselves.").[8] Thus, contrary to HHS's argument that relief without geographic or party limitation "goes beyond what is necessary to provide complete redress to the plaintiff[]" in this case, HHS Suppl. Br., Dkt. No. 108, at 43-44, such vacatur relief is precisely what is required to provide complete redress.

C. The District Court Erred In Equating the Statutory Remedy of Vacatur with a Permanent Injunction

The district court erred in concluding that there is no substantive "difference between the remedy of vacatur as opposed to the remedy of permanent injunctive relief" and in confusing case law about injunctions with the law as to the statutory remedy of vacatur. D. Md. Dkt. No. 115 at 9-10. Likewise, it erroneously (i) faulted the Plaintiff for not asking for "vacatur of the Rule on a nationwide basis"

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[8] The Supreme Court has repeatedly imposed the vacatur remedy under the APA without limitation to the parties or their geographic area. *See*, *e.g.*, *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 486 (2001) (finding the EPA's "implementation policy to be unlawful," and leaving it to the EPA to "develop a reasonable interpretation" of the relevant statutory provisions); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (affirming the Fourth Circuit's invalidation of the FDA's regulations governing tobacco); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) (affirming decision to invalidate a retroactive rule); *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 365 (1986) ("[T]he Court of Appeals invalidated the amended regulations. . . . We affirm."); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34 (1983) (rejecting arbitrary agency rulemaking and holding that "the agency must either consider the matter further or adhere to or amend Standard 208 along lines which its analysis supports"); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708 n.18 (1979) ("affirm[ing] the lower court's determination to set aside the amalgam of rules").

and (ii) interpreted Plaintiff's not taking "exception to" a state-based preliminary injunction as some flaw in their request for the vacatur remedy—when vacatur inherently annuls a rulemaking and requires no geographic specification. *Id*. at 7, 11. Indeed, the Supreme Court held in *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010), that vacatur pursuant to the APA is a "less drastic" remedy than an injunction, and that if vacatur "was sufficient to redress respondents' injury, no recourse to the additional and extraordinary relief of an injunction was warranted."

The APA's statutory remedy of vacatur is distinct from a court's exercise of traditional equitable discretion. Unlike some injunctions defined by geography, vacatur does not in fact "direct how [a] defendant must act toward persons who are not parties to the case." *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) (contending this is a "flaw" of certain injunctions). Rather, vacatur operates only at the agency and voids an agency's rule, allowing the agency then to take any appropriate action to comply with the law in the future. The Supreme Court has been clear that, as a result, a court—in affording a remedy for an APA violation—should issue an injunction only if it accomplishes some meaningful independent effect beyond vacatur that is required by the equities of the case. *See Monsanto Co.*, 561 U.S. at 165-66 (explaining that a nationwide injunction was inappropriate because the "injunction . . . does not

have any meaningful practical effect independent of [the] vacatur" of the agency's action).[9]

At minimum here, as Plaintiff repeatedly urged in the district court, vacatur is a necessary remedy for the serious rulemaking flaws Plaintiff has established. That statutory remedy operates on the rulemaking that occurred at HHS, and the district court's attempted geographic limitation makes no sense with regard to it. This Court should order true vacatur, full stop.

II. THE DISTRICT COURT'S ATTEMPT TO LIMIT VACATUR TO ONE STATE LEAVES PLAINTIFF WITHOUT FULL RELIEF AND HANDICAPS TITLE X'S NATIONAL FUNCTIONING

Vacatur is especially necessary for this Plaintiff in the context of Title X. Without actual vacatur of the 2019 Rule, Plaintiff has been left in a never-never land outside HHS's ongoing operation of Title X. As described above, HHS will continue to fund Title X grantees under the 2019 Rule, with any future FOA setting forth that rule's eligibility requirements, program terms, and competitive review

[9] *See also, e.g.*, *Diné Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831, 859 (10th Cir. 2019) ("Given our remand instructions to vacate, however, there is no need to also" issue an injunction. "Because vacatur is 'sufficient to redress [appellants'] injury, no recourse to the additional and extraordinary relief of an injunction [is] warranted.'" (quoting *Monsanto Co.*, 561 U.S. at 166)); *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 676 (S.D.N.Y.), *aff'd in part, rev'd in part and remanded*, 139 S. Ct. 2551 (2019) (noting that the Supreme Court in *Monsanto Co.* "admonished that a district court vacating agency action under the APA should not grant an injunction if doing so would not have any meaningful practical effect independent of its vacatur" but granting an injunction because it "would have two practical effects beyond mere vacatur").

criteria for applicants. As it stands now, there is no obligation for HHS to attempt to involve any Maryland applicant in a future Title X competition for funding, nor any process that would fairly and coherently do so. With applicants all vying for one annual federal appropriation of discretionary grant money, and no requirement that HHS fund Title X projects in each state, applicants from Maryland can be left out completely. Even if HHS tried to construct some two-tiered process, which is nowhere provided for, that would not accomplish the head-to-head merits competition that must govern such grant-making. *See supra* at 5-6. As part of any second tier, Maryland applicants (or others, if subject to a similarly improper pseudo-vacatur) could be allocated fewer dollars to compete for (if any), or scored more harshly, because they successfully challenged HHS's preferred 2019 Rule in court—yet it remains with some force of law. Instead, Plaintiff's necessary relief should provide equal access to one coherent system of Title X grant-making that is no longer governed by the improperly promulgated rule.

Moreover, the district court's artificially narrow approach thoroughly disrupts the national functioning of this unique federal family planning program. The hallmark of Title X's success has been uniform national standards, uniform program review to ensure those standards are met, uniform training resources, and uniform ease of access for all—including low-income patients, adolescents, and those who live in areas otherwise not adequately served with health care options.

Instead of fully remedying Plaintiff's injury from the unlawful and arbitrary rulemaking that it has proven, the district court's judgment removes Plaintiff from this national scheme—disadvantaging Plaintiff and leaving it out of the integrated, comprehensive family planning structure that Congress created for Title X.

At base, the Mayor and City Council of Baltimore brought this litigation to set aside an arbitrary, unfounded rulemaking because it not only harms the City but also fundamentally harms an essential federal program to the detriment of its beneficiaries: Baltimore sued because the 2019 Rule "reduce[s] access to care, interfere[s] with the patient-provider relationship, and undermine[s] Congress's intent in enacting Title X." Compl. ¶ 1. Until the 2019 Rule took effect, Baltimore had participated in Title X *since its inception* to benefit all patients needing family planning services. *Id.* ¶ 57.

Now that Baltimore has proven its APA claims, and exposed HHS's improper use of its rulemaking authority, this Court should provide it with the full relief necessary to remedy its injury. That means annulling the agency's improper action and forcing HHS to start again if it wishes to try to substitute a new set of regulations for Title X's prior, decades-old, effective ones. The fact that remedying Baltimore's injury will also benefit all Title X patients, and all those entities seeking a return to Title X's high-functioning history, is exactly the result

contemplated by the APA. The 2019 Rule must be declared a nullity for all purposes.

CONCLUSION

For all the foregoing reasons, this Court should affirm judgment for Plaintiff-Appellee and remove the district court's geographic limitation on vacatur of the 2019 Rule.

Dated: May 1, 2020

Respectfully submitted,

/s Ruth E. Harlow

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(b) because it contains 5307 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: May 1, 2020

/s Ruth E. Harlow
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